

FISH AND GAME COMMISSION
STATEMENT OF FACTS CONSTITUTING NEED FOR EMERGENCY ACTION

Emergency Action to Amend Section 632, Title 14, CCR,
Re: Stewarts Point State Marine Reserve

I. INTRODUCTION

The Marine Life Management Act (MLMA, Stats. 1998, ch. 1052) created a broad programmatic framework for managing fisheries through a variety of conservation measures, including Marine Protected Areas (MPAs). The Marine Life Protection Act (MLPA, Stats. 1999, ch. 1015) established a programmatic framework for designating such MPAs in the form of a statewide network. AB 2800 (Stats. 2000, ch. 385) enacted the Marine Managed Areas Improvement Act (MMAIA), among other things, to standardize the designation of Marine Managed Areas (MMAs), which include MPAs. The overriding goal of these acts is to ensure the conservation, sustainable use, and restoration of California's marine resources. Unlike previous laws, which focused on individual species, the acts focus on maintaining the health of marine ecosystems and biodiversity in order to sustain resources.

The MLPA requires that the Fish and Game Commission ("Commission") adopt a Marine Life Protection Program that, in part, contains an improved marine reserve (now state marine reserve) component [Fish and Game Code (FGC) subsection 2853(c)(1)] and protects the natural diversity of marine life and the structure, function, and integrity of marine ecosystems [FGC subsection 2853(b)(1)]. This protection may help provide sustainable resources as well as enhance functioning ecosystems that provide benefits to both consumptive and non-consumptive user groups. The program may include MPAs with various levels of protection, from no take of any kind to those that allow for specified commercial and recreational activities, provided that these activities are consistent with the objectives of the area and the goals and guidelines of the MLPA.

The planning process to implement the MLPA in the north central coast, defined as state waters between Alder Creek, near Point Arena (Mendocino County) and Pigeon Point (San Mateo County), was conducted pursuant to the processes defined in the Commission's revised draft Master Plan for MPAs. The MLPA North Central Coast Regional Stakeholder Group (NCCRSG) began meeting in May, 2007 to develop alternative MPA proposals for the north central coast region. The NCCRSG met during eight one- to two-day meetings and three work sessions between May 2007 and March 2008 before forwarding three proposals to a Blue Ribbon Task Force (BRTF). The BRTF was appointed by the Secretary for Resources to provide policy guidance and oversight to the process. The BRTF created an Integrated Preferred Alternative proposal (IPA) by selecting, and in some cases slightly modifying, MPAs from each of the three NCCRSG proposals with the intent to meet scientific guidelines and achieve the MLPA goals, while also bridging some of the remaining areas of divergence among the NCCRSG proposals. The BRTF recommended that the Commission select the IPA as the regulatory preferred alternative for the north central coast.

On August 5, 2009, the Fish and Game Commission adopted the IPA regulations to implement MPAs for California's north central coast, including the Stewarts Point State Marine Reserve (SMR) in which take of all living marine resources is prohibited. These regulations became effective May 1, 2010.

The Commission has prepared this Emergency Action Statement under the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) in connection with its amendments to Section 632 of Title 14 of the California Code of Regulations. The Commission's amendment of Section 632 as an emergency action under the APA is based, in part, on authority provided by FGC Section 240. This amendment of Section 632 will establish the Stewarts Point State Marine Conservation Area (SMCA) and will provide for the recreational take from shore of marine aquatic plants other than sea palm, marine invertebrates, finfish by hook and line, surf smelt by beach net, and species authorized in Section 28.80 (including surf smelt) by hand-held dip net in the SMCA.

As set forth below, the Commission finds that amendment of Section 632 pursuant to FGC 240 constitutes a necessary emergency action by the Commission under the APA. The health and safety of the people of the Kashia Band of Pomo Indians of the Stewarts Point Rancheria are jeopardized by the existing regulation which prohibits them from gathering food for their families. Kashia people fish and gather along the coast within their ancestral lands for subsistence as well as ceremonial purposes. The existing Stewarts Point State Marine Reserve designation is depriving Kashia families of the Stewarts Point Rancheria of access to food.

II. FACTS CONSTITUTING THE NEED FOR EMERGENCY ACTION

The APA defines an "emergency" to mean "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." (§11342.545.) To make a finding of emergency, the agency must describe the specific facts supported by substantial evidence that demonstrate the existence of an emergency and the need for immediate adoption of the proposed regulation. (*Id.*, §11346.1, subd. (b)(2).) Some of the factors an agency may consider in determining whether an emergency exists include: (1) the magnitude of the potential harm, (2) the existence of a crisis situation, (3) the immediacy of the need, i.e., whether there is a substantial likelihood that serious harm will be experienced unless immediate action is taken, and (4) whether the anticipation of harm has a basis firmer than simple speculation. The Commission has considered all of these factors and the definition of an emergency provided in the APA, as well as pertinent authority in FGC Section 240. Under this latter authority, notwithstanding any other provision of the FGC, the Commission may adopt an emergency regulation where doing so is necessary for the immediate preservation of the public peace, health and safety, or general welfare. The Commission finds that such necessity exists in the present case.

The recent creation of the Stewarts Point SMR created an unforeseen situation. Creation of the Stewarts Point SMR inadvertently prohibited Kashia people from fishing and gathering for subsistence purposes. The issue of Kashia Pomo tribal uses of coastal resources was not considered by the BRTF which proposed the North Central Coast regulation to the Commission.

Immediate action is needed to avoid serious harm to the health and safety and general welfare of the Kashia people. There are approximately 800 Tribal members, about 450 of whom are adults. Approximately 150 adults fish and gather; of those, less than 20 (who live on the Rancheria at Stewarts Point) fish or gather two or three times per week. There are probably 100 members who regularly engage in gathering. Much of the gathering is done by younger tribal members for elders. The Rancheria has 80 percent unemployment, is in a remote location, with a poor access road, and with few opportunities within a long, winding drive. Fishing is a source of food. Gathering sea weed and shellfish is also a source of food. Younger tribal members gather for the elders of the Rancheria who can no longer gather food for themselves. Rancheria residents do not fish or gather for commercial purposes; they do not smoke, can or otherwise store food in bulk. The current prohibition on take of living marine resources in Stewarts Point SMR denies the Kashia people access to food, shrinks appreciably the available sources of food, and by forcing them to go elsewhere, increases the time, cost and risk of gathering food (Stewarts Point is accessible; there are no steep hills, high bluffs, sheer drops, which make access to the resources unsafe.) Access to a primary source of food is a health and safety issue, directly related to the general welfare of the community.

III. Express Finding of Emergency

Pursuant to the authority vested in the Commission by FGC Section 240, and for the reasons set forth above, the Commission expressly finds that the adoption of this regulation is necessary for the immediate preservation of the health and safety and general welfare. The Commission specifically finds that the amendment of this regulation will avoid serious harm to the health and safety and general welfare of the Kashia people by allowing them to take living marine resources for subsistence purposes.

IV. Authority and Reference Citations

Authority: Sections 200, 202, 203.1, 205(c), 219, 220, 240, 1590, 1591, 2860, 2861 and 6850 of the Fish and Game Code, and Sections 36725(a) and 36725(e) of the Public Resources Code.

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V. Informative Digest

A. Laws Related to the Emergency Regulation

The Marine Life Management Act (MLMA, Stats. 1998, ch. 1052) created a broad programmatic framework for managing fisheries through a variety of conservation measures, including Marine Protected Areas (MPAs). The Marine Life Protection Act (MLPA, Stats. 1999, ch. 1015) established a programmatic framework for designating such MPAs in the form of a statewide network. AB 2800 (Stats. 2000, ch. 385) enacted the Marine Managed Areas Improvement Act (MMAIA), among other things, to standardize the designation of Marine Managed Areas (MMAs), which include MPAs. The overriding goal of these acts is to ensure the conservation, sustainable use, and restoration of California's marine resources. Unlike previous laws, which focused on individual species, the acts focus on maintaining the health of marine ecosystems and biodiversity in order to sustain resources.

The MLPA requires that the Commission adopt a Marine Life Protection Program that, in part, contains an improved marine reserve (now state marine reserve) component [Fish and Game Code (FGC) subsection 2853(c)(1)] and protects the natural diversity of marine life and the structure, function, and integrity of marine ecosystems [FGC subsection 2853(b)(1)]. This protection may help provide sustainable resources as well as enhance functioning ecosystems that provide benefits to both consumptive and non-consumptive user groups. The program may include MPAs with various levels of protection, from no take of any kind to those that allow for specified commercial and recreational activities, provided that these activities are consistent with the objectives of the area and the goals and guidelines of the MLPA.

On August 5, 2009, the Fish and Game Commission adopted regulations to implement MPAs for California's north central coast, defined as state waters between Alder Creek, near Point Arena (Mendocino County) and Pigeon Point (San Mateo County), including the Stewarts Point State Marine Reserve (SMR) in which take of all living marine resources is prohibited. These regulations became effective May 1, 2010.

B. Effect of the Emergency Action

This amendment of Section 632 will establish the Stewarts Point State Marine Conservation Area (SMCA). The general boundaries of the SMCA will be from the mean high tide line to a line that approximates a distance of 1000 feet offshore, and from the northern boundary of the existing Stewarts Point SMR to just below Rocky Point, approximately four miles south. All commercial take of living marine resources will be prohibited. The recreational take of marine aquatic plants other than sea palm, marine invertebrates, finfish by hook and line, surf smelt by beach net, and species authorized in Section 28.80 (including surf smelt) by hand-held dip net will be authorized consistent with other applicable law.

The proposed SMCA would leave three miles of coastline in SMR status, which meets the minimum science guidelines for coastal protection of nearshore habitats.

C. Policy Statement Overview

The objective of this emergency regulation is to create the Stewarts Point SMCA and to allow specified recreational take of living marine resources within the SMCA.

VII. Specific Agency Statutory Requirements

The Commission has complied with the special statutory requirements governing the adoption of emergency regulations pursuant to FGC Section 240. The Commission held a public hearing on this regulation on June 24, 2010, and the above finding that this regulation is necessary for the immediate preservation of the health and safety and general welfare meets the requirements of Section 240.

VIII. Impact of Regulatory Action

The potential for significant statewide adverse economic impacts that might result from the emergency regulatory action has been assessed, and the following determinations relative to the required statutory categories have been made:

- (a) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

- (b) Nondiscretionary Costs/Savings to Local Agencies:

None.

- (c) Programs Mandated on Local Agencies or School Districts:

None.

- (d) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4, Government Code:

None.

- (e) Effect on Housing Costs:

None.